IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73–1380

THE CHEMEHUEVI TRIBE OF INDIANS, *ET AL.*,
Petitioners

v.

FEDERAL POWER COMMISSION,
Respondent

NO. 73–1666

ARIZONA PUBLIC SERVICE COMPANY, *ET AL.*,
Petitioners

v.

THE CHEMEHUEVI TRIBE OF INDIANS, *ET AL.*,
Respondents

NO. 73–1667

FEDERAL POWER COMMISSION, *Petitioner*

v.

THE CHEMEHUEVI TRIBE OF INDIANS, *ET AL.*
Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for the Electric and Water Plant Board of Frankfort, Kentucky; The Municipal Light Department of Wakefield, Massachusetts; and The Northern California Power Agency, as Amici Curiae

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THE COURT BELOW ERRED IN ITS CONCLUSION THAT THE FULFILLMENT OF THE COMMISSION'S MANDATE UNDER THE FEDERAL POWER ACT DOES NOT REQUIRE THE ASSERTION OF JURISDICTION BY THE COMMISSION OVER STEAM ELECTRIC PLANTS AFFECTING INTERSTATE COMMERCE OR NAVIGABLE WATERS 3

A. Part I of the Federal Power Act Gives The Commission a Broad Mandate to Regulate The Use of the Nation's Waterways In the Public Interest 3

B. The Court Erred in Its Conclusion That Part I of the Act Specifically Excluded Licensing of Steam Plants Affecting Jurisdictional Water 8

C. A Regulatory Agency Must Take Account of Changes in Technology and Public Policy in Administering its Statutory Duties 9

D. The Development of Large Power Plants That Utilize Enormous Amounts of Cooling Water is a Relatively New Technological Development That Merits Assertion of Commission Jurisdiction Under Part I of the Act. The Court Erred In Concluding That Withdrawals for Cooling Purposes Would Not Impinge on the Commission's Licensing Jurisdiction 10

E. The Failure of the FPC To Assert Jurisdiction over Steam Plants is Contrary to the Public Interest Since It Creates a Gap in the Commission's Regulatory Duties Significant Enough to Undermine its Primary Statutory Objective Under Part I and Ignores Other Major National Policies 16

F. *Taum Sauk* Does Not Support The Court of Appeals' Decision In This Case 18

II. THE PUBLIC INTEREST REQUIRES THAT THE COMMISSION ASSERT ITS LICENSING AUTHORITY OVER STEAM PLANTS THAT AFFECT JURISDICTIONAL WATERS. . . . 21

III. THE DECISION OF THE COURT BELOW RELATING TO THE COMMISSION'S AUTHORITY UNDER THE SURPLUS WATER CLAUSE SHOULD BE UPHELD 25

CONCLUSION 28

TABLE OF CITATIONS

Page

Cases:

American Trucking Associations, Inc. v. *Atchison, Topeka and Santa Fe Railway Co.*, 387 U.S. 397 (1967) 9, 17

Arkansas Power & Light Co., 40 FPC 522 (1968) 6

Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U.S. 378 (1959) 24

Brazos River Authority, 34 FPC 1507 (1965) 6

California v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) 18, 25

Chemehuevi Tribe of Indians v. *Federal Power Commission*, 489 F.2d 1207 (D. C. Cir. 1973 . . . . . 4, 9, 26

Duke Power Co., 36 FPC 675 6

FMC v. *Svenska Amerika Linien*, 390 U.S. 238 (1968) 7, 8, 19

Federal Power Commission v. *Union Electric Co.*, 381 U.S. 90 (1965) 24

Federal Power Commission v. *Hunt*, 376 U.S. 515 (1964) 24

Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17 (1952) 24

Federal Power Commission v. *Sunray Dx Oil Co.*, 391 U.S. 9 (1968) 24

Federal Power Commission v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1 (1961) 18, 25

First Iowa Hydroelectric Coop. v. *Federal Power Commission*, 328 U.S. 152 (1946) . . . 19

Gulf States Utilities Company v. *Federal Power Commission*, 411 U.S. 747 (1973) . . . 24, 25

McLean Trucking Company v. *United States*, 321 U.S. 67 (1944) 24

Municipal Electric Ass'n. of Mass. v. *Federal Power Commission* 414 F.2d 1206 (D.C. Cir. 1969) 6, 11

NLRB v. *Plasterers' Union*, 404 U. S. 116 (1971) 28

Northern Natural Gas Co. v. *Federal Power Commission*, 399 F.2d 953 (D.C. Cir. 1968) . . 24

Phillips Petroleum Co. v. *Wisconsin*, 347 U. S. 672 (1954) 18

Rumford Falls Power Co., Project No. 2333 36 FPC 605 (1966) 7

Rumford Falls Power Co., v. *Federal Power Commission*, 355 F.2d 683 (1st Cir. 1966) 7

Russel v. *Farley*, 15 Otto 433, 26 L.Ed 1060 (1882) 24

Texaco v. *Federal Power Commission*, 290 F.2d 149 (5th Cir. 1961) 24

Udall v. *Federal Power Commission*, 387 U.S. 428 (1967) 6

United Gas Improvement Co. v. *Callery Properties*, 382 U.S. 223 (1965) 24

United States v. *Pennsylvania R. R. Co.*, 323 U.S. 612 (1945) 17

United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 10,17,18

Western Massachusetts Electric Co., Project No. 1889; The Connecticut Light & Power Company, The Hartford Electric Light Company and Western Massachusetts Electric Company, Project No. 2485, 39 FPC 723 23

STATUTES:

Federal Power Act 41 Stat. 1063, as amended, 16 U.S.C. 791, *et seq* 2, 3, 4, 27

Section 4e, 16 U.S.C. 797(e) 21, 26, 27
Section 10a, 16 U.S.C. 803(a) 4, 27
Section 23b, 16 U.S.C. 817 19

MISCELLANEOUS:

Hearings:

Hearings before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess 12

Reports:

S. Rep. No. 621, 74th Cong., 1st Sess 4, 6

Agency Reports:

Federal Power Commission, The 1970 National Power Survey 12, 14

Federal Power Commission, Bureau of Power, "Problems in Disposal of Waste Heat from Steam Electric Plants" (1969) . . . 22

Law Journal Articles:

Pinchot, "The Long Struggle for Effective Federal Water Power Legislation," 14 Geo. Wash. L. Rev. 9 (1945) 4

Tarlick, Tippy, & Francis, "Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions," 45 S. Cal. L. Rev. 502 (1972) 23

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STATEMENT OF INTEREST

The Electric and Water Plant Board of Frankfort, Kentucky; the Municipal Light Department of Wakefield, Massachusetts; and the Northern California Power Agency,

including the Cities of Santa Clara, Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, and Ukiah, California; and the Plumas-Sierra Rural Electric Cooperative ("Cities" or "Amici") are all small electric systems distributing or whose members distribute to their consumers electricity purchased wholly or in part from public utilities under the Federal Power Act.

The Cities' interest in this proceeding stems from the applicability of the conditioning authority exercised by the Federal Power Commission ("FPC" or "Commission") under its Part I licensing provisions. This conditioning authority includes matters relating to antitrust, access to transmission and generation, the environment and other beneficial public purposes. Presently, steam plants producing electricity are not regulated by the Commission. As we demonstrate steam plants located on or affecting the navigable waters of the United States are subject to FPC jurisdiction under Part I, and the FPC should have the opportunity to provide for the economically rational construction and operation of generation plants utilizing these waters for the benefit of consumers furnished power by all segments of the industry.

SUMMARY OF ARGUMENT

Part I of the Federal Power Act extends to steam plants affecting navigable waters or interstate commerce, since the primary legislative objective of Part I was to assure the best plan for the comprehensive development of the nation's water resources. The court below erred in concluding that Part I was intended to be limited to hydroelectric projects and that steam plants were specifically excluded under Part I because Congress had not provided for the regulation of the electric power industry under Part I. Congress could not have foreseen the magnitude of the

use and hence the impact upon the nation's waterways by steam plants for cooling water purposes.

The public interest in the Commission's assertion of jurisdiction lies in the Commission's licensing authority and includes consideration of items as diverse as antitrust, the environment, and more economically priced electricity for the consumers of the nation's pluralistic electric industry. Moreover, such conditioning is fully consistent with the Commission's authority and responsibilities under Part II of the Act. Finally, the decision of the court below should be upheld as to the surplus water clause since its analysis rests properly on the broad considerations Congress set forth as the objectives for the Commission under Part I of the Act.

ARGUMENT

I.

THE COURT BELOW ERRED IN ITS CONCLUSION THAT THE FULFILLMENT OF THE COMMISSION'S MANDATE UNDER THE FEDERAL POWER ACT DOES NOT REQUIRE THE ASSERTION OF JURISDICTION BY THE COMMISSION OVER STEAM ELECTRIC PLANTS AFFECTING INTERSTATE COMMERCE OR NAVIGABLE WATERS.

A. Part I of the Federal Power Act Gives the Commission a Broad Mandate to Regulate the Use of the Nation's Waterways in the Public Interest.

In supporting its denial of the Petitioners' argument

that the Commission should license and regulate the steam plants, in issue the court below stated:

> "The 1920 Act thus did not direct the FPC to regulate broadly the Nation's electric power industry or its major waterways, and we cannot conclude that recognizing Commission jurisdiction over steam plants is essential to fulfillment of the agency's congressional mandate."[1]

What the court below overlooked is that the 1920 Act did indeed grant to the Commission a broad mandate to "secure Commission control over all projects involving the development of the Nation's water resources."[2] Section 10(a) of Part I of the Act, 16 U.S.C. 803(a), specifically provides that "***all*** licenses issued under this Part shall be on the following conditions:

> (a) That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

In discussing the history of Part I of the Federal Power Act, Gifford Pinchot cites a letter by President Theodore Roosevelt to the members of the Inland Waterways Commission as indicative of the thinking that led to Part I of the Act.[3] The letter, in part, states:

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[1] ***Chemehuevi Tribe of Indians*** v. ***Federal Power Commission***, 489 F.2d 1207 (D.C. Cir. 1973) at 1231.

[2] Senate Report To Accompany S. 2976, Public Utility Act of 1935, S. Rep. No. 621, 74th Cong., 1st Sess. The 1920 Act become Part I of the Federal Power Act.

[3] Pinchot, "The Long Struggle for Effective Federal Water Power Legislation," 14 Geo. Wash. L. Rev. 9 (1945) 15, 16.

> "Works designed to control our waterways have thus far usually been undertaken for a single purpose, such as the improvement of navigation, the development of power, the irrigation of arid lands, the protection of lowlands from floods, or to supply water for domestic and manufacturing purposes. While the rights of the people to these and similar uses of water must be respected, the time has come for merging local projects and uses of the inland waters in a comprehensive plan designed for the benefit of the entire country. Such a plan should consider and include all the uses to which streams may be put, and should bring together and coordinate the points of view of all users of waters." (Footnote omitted)[4]

Pinchot further notes that the report of the Inland Waterways Commission, which was the basis for Part I, "was based on two fundamentally important principles . . .:

> First, that every river system is a unit from its source to its mouth and should be treated as such.
>
> Second, that plans for ***any use*** of our inland waterways should 'take account of the purification of the waters, the development of power, the control of floods, the reclamation of lands by irrigation and drainage, and all other uses of the waters or benefits to be derived from their control." (Footnote omitted)[5] (emphasis added)

The Congressional emphasis on Part I as guiding the development of the nation's water resources is underscored by the amendment made to Part I in 1935. The Senate Report explaining an amendment to Part I in 1935 stated:

> "The present definition of 'corporation' limits the use of that term to corporations authorized to develop, transmit, distribute, sell, lease or utilize electric power. A broader definition is substituted to make that term embrace all corporations,

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[4] *Id.*, at 15.

[5] *Id.* at 15, 16.

> ***whether dealing in electricity or not***, and also to include unincorporated forms of organization other than an individual business. This broader use of the term is more useful than that of the present act. . ." (emphasis added)[6]

In reviewing the Commission's authority under Part I, the courts have emphasized the Commission's duty to protect the Nation's water resources. Thus, in ***Municipal Electric Ass'n. of Mass.*** v. ***Federal Power Commission***, 414 F.2d 1206 (D.C. Cir. 1969), at 1207, the court stated:

> "The Commission is empowered to license power projects utilizing the navigable waters of the United States. (Footnote omitted) This is not a small power or one to be exercised lightly. The nation's rivers are among its greatest economic resources and natural treasures. A license to construct a power project using a river authorizes the licensee 'to appropriate water resources from the public domain.' ***Udall*** v. ***F.P.C.***, 387 U.S. 428 . . . (1967)."

It would thus appear clear that the 1920 Act focused on the waterway, as did the 1935 amendments to the 1920 Act, and Congress gave the Commission the primary function to license projects that in any way affected the development of the nation's water resources as encompassed by a physical waterway and individuals requiring licenses were not necessarily electric utilities.

Later Commission opinions and actions support the position that the Commission has not exclusively focused on hydro power development to the exclusion of the public interest in the multiple development of the nation's waterways. Hence, in ***Arkansas Power and Light Co.***, 40 F.P.C. 522 (1968), the Commission specifically provided for the use of a federally-licensed reservoir in connection with cooling water for steam power plants.[7] In ***Rumford Falls***, the Commission also evidenced a concern for the best use of

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[6] S. Rep. No. 621, 74th Cong., 1st Sess., at p. 42.

[7] Also see ***Brazos River Authority***, 34 F.P.C. 1507 (1965) and ***Duke Power Co.***, 36 F.P.C. 675 (1966).

the water resources in the public interest; conceivably even to the extent of switching the use of a power project to another beneficial use completely, subject to proper compensation.[8]

As this Court stated, in ***Federal Power Commission*** v. ***Union Electric Co.***, 381 U.S. 90 (1965), at 98, 99:

> "The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and very prominently, hydroelectric power – uses which, while unregulated, might well be contradictory rather than harmonious. (Footnote omitted)
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>
> "As this Court has had occasion to note before, the 1920 Federal Water Power Act 'was the growth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, ***insofar as it was within the reach of the federal power to do so***. . . .' "

Statutory language thus charging the Commission with the duty to oversee comprehensive development of the Nation's waterways can hardly be called a niggardly grant of power, and the court below was in error in stating that the 1920 Act did not direct the FPC to regulate broadly the Nation's major waterways.

The court further erred when it held that the absence of a Congressional mandate to regulate broadly the Nation's electric power industry ***under Part I*** was grounds for denying the Commission jurisdiction over steam plants. Part II of the Act determines the scope of the Commission's authority

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[8]See ***Rumford Falls Power Co.*** v. ***Federal Power Commission***, 355 F.2d 683 (1st Cir. 1966), and Memorandum Opinion on Remand, ***Rumford Falls Power Co.***, Project No. 2333, 36 F.P.C. 605 (1966).

over the electric power industry, and insasmuch as Congress did not enact Part II until 1935, it clearly did not make the Commission's Part I jurisdiction contingent upon Commission jurisdiction of the electric power industry. Accordingly, the only relevant test of jurisdiction under Part I is whether the 1920 Act gave the Commission a broad mandate to regulate the Nation's waterways, and this Court's language in ***Union Electric***, ***supra***, resolves this in favor of Commission jurisdiction over the waterways.

B. The Court Erred in its Conclusion that Part I of the Act Specifically Excluded Licensing of Steam Plants Affecting Jurisdictional Waters.

The court below rejected the Petitioner's argument that steam plants could be included under the framework of Part I of the Act in the following way:

1. "... most of the electric power produced in this country at the time the Act was passed was generated by water-cooled steam plants."

2. "... any legislation intended to regulate comprehensively the interrelationship between the production of power and the efficient management of water resources would surely have taken account of the existence of these water-using steam plants."

3. "Congress' failure to do so refutes the argument that the FPC should regard steam plants as an unspecified or unanticipated method of operation whose regulation should now be undertaken as an obvious part of the congressional scheme."

4. "Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness."

The argument is in error, however. It is irrelevant that most of the electricity generated in 1920 was by water-cooled steam plants. As will be discussed, ***infra***, the tech-

nology and magnitude of impact on the waterways were so different in 1920 that water-cooled, steam-generated plants could not reasonably have been anticipated by Congress to affect the navigable waters. Since the development of the waterways, and ***not*** the production of power, was the primary concern of Congress, there is no basis for the court's conclusion that the lack of specific reference to steam generation represents a purposeful omission from the congressional scheme, or that the court is being asked to "rewrite the statute to correct what may have been legislative shortsightedness."[9] A more correct interpretation of Congressional intent is that Congress meant what it said in the statute, namely, that it gave the FPC broad authority to license the use of the waterways to applicants "in the public interest for the use or benefit of interstate or foreign commerce," in light of then-current conditions.

C. A Regulatory Agency Must Take Account of Changes in Technology and Public Policy in Administering Its Statutory Duties.

It is in the nature of a regulatory agency's duties that its tasks are constantly in a state of flux and subject to changes due to developments in technology and changing public priorities and concerns. As this Court stated, in upholding the reversal by the Interstate Commerce Commission of a policy it had "insisted" on for over 25 years,

> "... this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adopt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and future within the inflexible limits of yesterday."[10]

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[9] 489 F.2d at 1231.

[10] ***American Trucking Associations, Inc.*** v. ***Atchison Topeka and Santa Fe Railway Co.***, 387 U.S. 397 (1967) at 416.

The Respondents ("Companies" and "Commission" or "FPC") argue that the various attempts by the Commission to secure a federal power plant siting statute as well as past Commission declarations denying licensing authority over steam generation are dispositive of the jurisdictional issue raised herein. However, attempts by agencies to have Congress clarify their duties are not assumed to be dispositive in jurisdictional matters. Thus, in ***United States*** v. ***Southwestern Cable Co.***, 392 U.S. 157 (1968) at 165, this Court noted the attempts by the Federal Communications Commission to obtain "amendatory legislation" because of its view "that it had not been given plenary authority over 'any and all enterprises which happen to be connected with one of the aspects of communications.' " What was pertinent to this Court in ascertaining the correctness of the Commission's eventual decision to regulate CATV systems was the underlying purpose of the Communications Act, ***i.e.***, to recognize "the rapidly fluctuating factors characteristic of the evaluation of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." (footnote omitted)[11] In the following section, Cities will describe the effect of the steam plants upon the Nation's waterways and their consequences for effective Part I administration of the Nation's waterways by the Commission.

D. The Development of Large Power Plants that Utilize Enormous Amounts of Cooling Water is a Relatively New Technological Development that Merits Assertion of Commission Jurisdiction Under Part I of the Act. The Court Erred in Concluding that Withdrawals for Cooling Purposes Would Not Impinge on the Commission's Licensing Jurisdiction.

Although the court below agreed "that modern steam plants are of a size and efficiency unknown at the time of the passage of the Federal Water Power Act, that they use correspondingly more water for cooling purposes, and that the earlier plants returned most of their cooling waters to the water source instead of evaporating it," it appeared

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[11] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), at 172.

distressingly unaware of the impact of those findings upon the comprehensive development of the waterways in the public interest, as required by Part I of the Act. Indeed, the court below erred in its conclusion on p. 1232 that:

> "If the 'power potential in water' is not involved when water is heated to drive a turbine, there would appear to be less warrant to conclude that it is involved when water is used in the post-generation, cooling process. (Footnote omitted) And there would be no warrant to conclude that ***the mere extraction of water, with a consequent decrease in the amount of water available to downstream users for power generation,*** utilizes the 'power potential in water' in a manner impinging on the FPC's licensing jurisdiction." (emphasis added)

The court's reasoning errs in two respects. First, the relevant question determinative of FPC jurisdiction is not the distinction between water being heated to produce steam and water being used to cool the condensors; it is the effects of the extraction and release of the water upon the waterway. Furthermore, the effect is not limited to the concerns of "downstream users for power generation," but to the wider public and the national interests as reflected in the Act.[12] In other words, courts must look not only to whether the extraction of water from jurisdictional waterways affects hydroelectric power generation subject to FPC licensing but whether the use of water for steam plant cooling affects the many other interests encompassed within the Commission's licensing jurisdiction.

Under the Commission's Part I authority, "the Commission has important conservation responsibilities . . . These considerations include the effects of project construction and operation on fish and wildlife resources, scenic and recreational values, provision of minimum flows in the interest of water quality, the health and safety of the

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[12] *Cf.* language in ***Municipal Electric Ass'n. of Mass.*** v. ***Federal Power Commission,*** 414 F.2d 1206 (D.C. Cir. 1969) that ". . . the statute (*i.e.*, Part I) does not merely require that the license suit the public interest, or be appropriate, but in effect imposes a 'highest and best use' standard."

public, and the effect that steam generation plants and other industrial users will have on the thermal and chemical properties of the project waters."[13] In his testimony, the Chairman of the Commission noted that the Commission has conditioned the use of FPC-licensed reservoirs for the use of cooling water for steam plants and recognized the effects of projects on fish and recreational resources[14] as well as other environmental effects. He further noted that the Commission had, in 1969, "about 40 technical staff members who spend some or all of their time in one or more aspects of environmental analysis."[15]

Apart from the Commission's growing role in monitoring and regulating the use of waters for cooling steam electric plants, the magnitude of the power industry's consumption of the nation's available water resources has only recently been examined and categorized. Thus, the Commission's *1970 National Power Survey* reported:

> "The electric power industry relies heavily on the nation's water resources. It uses but does not consume approximately four-fifths of the total water used by all industry for cooling purposes. It also accounts for nearly one-third of the total water uses for all purposes. The power industry's use of water (as coolant but not for consumption) is expected to increase substantially along with the nearly quadrupled scale-up of power generation in the next two decades."[16]

The following excerpt from the Statement of Carl Klein, Assistant Secretary for Water Quality Research, Department of the Interior, is also illuminating:[17]

> "Thermal pollution is of major concern because of its burgeoning impact on the environment now and in the foreseeable future. Many recent

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[13] Testimony of John N. Nassikas, Chairman, Federal Power Commission, Hearings before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess., Part I, p. 39 (1969). [Hereinafter referred to as "Hearings"].

[14] *Ibid.*

[15] *Id.*, at pp. 39, 40.

[16] Federal Power Commission, *The 1970 National Power Survey*, Part I, p. I-1-25 (1971).

[17] "Hearings" at p. 291.

analyses show a doubling of electrical needs in the United States every 10 years and, in some areas, as little as every 6 years.

"The electric power industry uses about 70 percent of all the water taken in by industry which is used for the sole purpose of dissipating waste heat.

"Other sources of thermal pollution exist, of course, but their impact upon the environment is only one-fifth that of the electric power industry.

"At present, about 81 percent of the generating capacity of the United States comes from thermal generating plants – both fossil fueled and nuclear.

* * *

"It has been repeatedly pointed out, even as late as this past week, by Charles F. Luce, former Under Secretary of the Department of the Interior and presently chairman of the board of Consolidated Edison of New York, that, by 1980, electrical power needs will require the use of one-sixth of the total available fresh water runoff in the entire Nation for cooling purposes.

"Now, if we discount flood flows . . ., it becomes apparent that the power industry will require about half the total runoff for the remaining two-thirds of the years.

"More recent projections of the waste heat load by the year 2000, which take into account probable technical improvements, indicate that ***the requirement for cooling water will equal two-thirds of the total national daily runoff of 1,200 billion gallons.***" (emphasis added)

The effects of such large-scale usage of the Nation's water resources are not merely those of diverting water. There are deleterious effects on the water from being heated and passed through the condensors, for example, the

capacity of the stream to assimilate other wastes is decreased and the life cycle of aquatic organisms may be so disrupted as to change the natural condition of the river.[18] Moreover, the availability of cooling water directly influences the fuel mix and supply of electricity, especially in the Southwest. The Task Force on Fuels prepared a report on "Energy Supply and Demand for the West Region" for the ***1970 National Power Survey*** that detailed the interrelationships between water supplies for cooling, fuel mixes for power generation, and the supply of electricity in the West Region, an area comprising the western states, and encompassing the specific plants noted in the present case.[19] The Task Force report concluded that "[w]hile it is well known that the potential western area coal resources are vastly greater than the water supplies needed for development, the seriousness of the water limitation is less well known and continues to be misunderstood."[20] Some of the misunderstanding was attributed by the Task Force to "the recurrence of a persistent fallacy . . . that once-through cooling is not a consumptive use of water."[21] It is a fact that practically all processes to cool the heated water result in some evaporation, or a permanent loss in the amount of water returned by the plant.[22]

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[18] "Hearings", p. 293.

[19] See Appendix 2, "Energy Supply and Demand for the West Region," prepared by Task Force on Fuels (Subcommittee on Generation), ***The 1970 National Power Survey***, Part III, pp. III-3-44 to III-3-119.

[20] At p. III-3-66.

[21] *Ibid.*

[22] See, for example, the following from "Problems in Disposal of Waste Heat From Steam-Electric Plants," Bureau of Power, Federal Power Commission (1969), at p. 37:

> "The consumptive uses of condensing water supplies depend principally upon the type of cooling system. For once-through systems using rivers, lakes, and reservoirs as sources, the losses, due primarily to induced evaporation in the receiving waters, would be one percent or less of the condenser flows. With cooling ponds the losses are of the order of one-half percent or more of the condenser flows. With evaporative cooling towers, the losses for evaporation, windage, and blowdown would probably be two percent or more of the condenser flows."

Moreover, the use of cooling waters for the large, steam plant complexes represented in this case is not a simple case of extracting water, as the lower court appeared to view it. It is, instead, a complicated matter of drawing water in a manner that will not affect other downstream users of waters and returning it in a manner that will not adversely affect other downstream interests or the environmental and other considerations included in a best plan for comprehensive development. Whether such extraction and return can be accomplished economically depends on whether technology is available to prevent, for example, the combination of steam being expelled into the air from the cooling process with other elements to form a harmful vapor (like sulfuric acid) that will return to the water and contaminate it for downstream users, or kill the fish in the waters; on whether the local fish and wildlife are equipped to handle the kinds of disequilibrium presented by the operation of the plant and the installed intake and outtake equipment; whether ground water is available to augment the waters being returned to the river; and whether any authority can compel the best use of both land and water resources to minimize adverse impacts of both construction and operation of the steam plants upon the waterway. The above list is only a partial list of the many considerations affecting the operation of a large steam plant complex. Another obvious consideration that could well affect a downstream hydroelectric project is the ***timing*** of the withdrawals and returns of water by the steam plant. As hydroelectric projects are increasingly becoming valued for their peaking capability in the interconnected grid system, their ability to time their use to maximize the system's use of their power depends on certain assurances about the availability of water when it is called upon. Unless these considerations are raised early in the planning stage of a steam plant complex, there is no assurance to the downstream hydro operator that the steam plant's operations will not detrimentally affect the hydro operations, and also the ability to meet conditions affecting environmental protection that the hydroelectric operator assumed under its FPC license.

The cumulative impact of rapid growth in electricity demand with the development of enormous generators, often located in large electric generation "parks" and requiring very large volumes of water, could simply not have been foreseen by Congress. Nevertheless, the problem is here, and has now become so significant that it poses a definite threat to the best development of our Nation's waterways. Plants drawing vast amounts of water from jurisdictional waterways, consuming, in part, and polluting in part; and affecting, for better or worse, the environment, the supply of electricity in interstate commerce, the fuel mix available for electricity generation with all its ramifications for the environment and the economy, surely are not insignificant developments that the FPC can ignore, given its broad mandate. Affirmative Commission action is especially appropriate where Congress has not excluded steam plants specifically from Part I licensing and could not reasonably have been expected to foresee the course of technological development in the production of electricity upon the use of the Nation's waterways.

E. The Failure of The FPC to Assert Jurisdiction Over Steam Plants is Contrary to the Public Interest Since It Creates a Gap in the Commission's Regulatory Duties Significant Enough to Undermine Its Primary Statutory Objective Under Part I and Ignores Other Major National Policies.

The failure of the Commission to assert jurisdiction leaves the entire issue of the development of the waterways in a most unsatisfactory state in terms of the safeguards Congress obviously thought it had authorized under Part I. Although a few states have enacted statutes governing the construction and operation of steam plants, the majority of the states have no legislation whatever. Of those that have legislation, the statutes vary both in their provisions and enforcement.

The impossibility of tying this patchwork of state, federal, and local regulations into national policies relating to the development of the waterways, the Nation's energy priorities, and the concern for the environment are obvious. While an administrative agency may excel at balancing priorities among various goals, it would be hard put to

resolve matters where the question of jurisdiction itself is in issue.

The appropriate limits of any agency's assertion of jurisdiction in carrying out its duties are a matter for judicial review. Nevertheless, where, as here, the failure to assert jurisdiction would undermine the primary charge by Congress to the Commission, the courts have held that the Commission must assume its responsibilities. As this Court stated, where Congress had designed an Act to provide broad authority in the transportation field to the Interstate Commerce Commission, it must be assumed "that the Commission therefore had powers commensurate with that goal."[23] Thus, in ***United States*** v. ***Pennsylvania Railroad Co.***, 323 U.S. 612 (1945), this Court upheld the assertion of jurisdiction by the ICC over "Seatrain" cars to the extent that it required the railroads to interchange their cars with Seatrain cars. The railroads had argued that this new form of transport carriage was not covered by the relevant statute. This Court held, at 323 U.S. 616, that it could not agree with such a narrow reading of the statute that extracted Congressional prohibition through "the absence of specific language." This Court further noted, at 323 U. S. 616, that the "very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out . . . in the light of the Congressional purpose to foster an efficient and fair national transportation system." In ***American Trucking***, this Court likewise refused to find prohibition as to a new service, ***i.e.***, piggy back service, since the ICC's assertion of jurisdiction reflected "its [the ICC's] judgment in light of current facts as to the proper inter-relationship of several modes of transportation with respect to an important new development."[24] In ***Southwestern Cable***, this Court upheld the agency when it acted to extend its jurisdiction over CATV, hitherto in dispute as to jurisdiction, because it found "the likelihood or probability of [CATV's] adverse impact upon potential and existing service has become too substantial to be dismissed . . . CATV competition can have a substantial

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[23] ***American Trucking Associations*** v. ***Atchison, Topeka, and Santa Fe Railway Company***, 387 U.S. 397, 410 (1967).

[24] ***Ibid.***

negative effect upon station audience and revenues. . ."[25] In ***Phillips Petroleum Co.*** v. ***Wisconsin***, 347 U.S. 672 (1954), this Court required the Federal Power Commission to assert jurisdiction over producers of natural gas engaged in interstate commerce. This Court emphasized the national concern in regulation of such producers and the "direct and substantial effect on the price paid by the ultimate consumers" because of the prices paid to the producers.[26] Because "the primary aim of the Natural Gas Act" was "[p]rotection of consumers against exploitation at the hands of natural gas companies," this Court refused to construe narrowly the existing statutory language so as to exempt producers from the Commission's jurisdiction.[27] Furthermore, the refusal of the Commission to assert jurisdiction in the present situation would create the sort of "attractive gap" in regulation that this Court, in ***Federal Power Commission*** v. ***Transcontinental Gas Pipeline Corp.***, 365 U.S. 1, 20-22 (1961) and ***California*** v. ***Lo-Vaca Gathering Co.***, 379 U.S. 366, 369-370 (1965) has determined Congress did not intend to leave in the passage of Part II of the Act.

What this line of cases represents is the logical extension of agency jurisdiction where to do otherwise would be to obviate and diminish the agency's ability to carry out its primary objectives. In the case presently before this Court, Petitioners argue that the Commission will no longer be able to control the comprehensive development of the waterway unless it takes jurisdiction over the biggest user of water from the Nation's waterways, *i.e.*, the steam plants. The trend towards monopolization of our water resources for steam plant cooling is not temporary but is fully expected to increase in the future and increase significantly.[28] It is not an exaggeration to say that the development of our major waterways will, for the most part, depend on the extent its waters are used for steam plant cooling purposes. The Commission's avoidance of such jurisdiction is tantamount to an avoidance of its statutory duties and accordingly, should not be permitted.

F. *Taum Sauk* Does Not Support The Court of Appeals' Decision In This Case.

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[25] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) at 165.

[26] 347 U.S. at 672.

[27] *Ibid.*

[28] See pp. 11–13, *infra.*

In the ***Taum Sauk*** case, ***Federal Power Commission*** v. ***Union Electric Company***, 381 U.S. 90 (1965), the issue before this Court was whether the licensing authority of the Commission pursuant to Section 23(b) of the Federal Power Act, 16 U.S.C. 817, was limited to the effect of a proposed pumped storage hydroelectric project on downstream navigability or included the full scope of Congressional authority over interstate commerce. Union Electric proposed to build a pumped storage hydroelectric facility to be located on a non-navigable tributary of a navigable river. The Commission had held that the project would require a license under Section 23(b) as it would (1) transmit power to a number of states, thus affecting interstate commerce and (2) it would affect downstream navigation.[29] The Court of Appeals reversed on the grounds that the only relevant consideration of the Commission under Section 23(b) was the effect of the proposed project on downstream navigation, and there had not been a sufficient showing that the project would have a significant navigation impact.[30] This Court upheld the Commission's decision, holding that Congress had drawn ". . . . upon its full authority under the Commerce Clause . . . "(381 U.S. at 96) in the drafting of Section 23(b), and there was ". . . obviously little merit to the argument that Section 23(b) requires a license when the interests of water commerce are affected but dispenses with the license when other commerce interests are vitally involved."[31]

This Court reviewed the legislative history of Part I of the Federal Power Act, finding that the intended purpose of the Act was to ". . . promote the comprehensive development of the water resources of the Nation . . ." (381 U.S. at 99 quoting ***First Iowa Hydroelectric Coop.*** v. ***Federal Power Commission***, 328 U.S. 152, 180) and that the purpose would be ". . . more fully served if the Commission must . . . consider the impact of the project on the full spectrum of commerce interest." (381 U.S. at 101) This Court, in fashioning its decision, found it necessary to respond to Union Electric's contention that if it were found that under Section 23(b) jurisdiction rested on a project's generation of

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[29] ***Union Electric Co.***, 27 F.P.C. 801.

[30] ***Union Electric Company*** v. ***Federal Power Commission***, 326 F.2d 535 (8th Cir. 1964).

[31] 381 U.S. at 101.

interstate power, there was no logical difference between a hydroelectric plant and a steam plant located on a stream over which Congress has jurisdiction and which generates interstate power. This Court stated:

> "The answer to the conundrum is that unlike Part II of Title II of the Public Utility Act of 1935, under which the Commission regulates various aspects of the sale and transmission of energy in interstate commerce, Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." (381 U.S. at 110, footnotes omitted)

The court below placed great reliance on this language though recognizing that the question of Commission jurisdiction over generating plants had not been before this Court in ***Taum Sauk*** and that therefore the discussion in the opinion was ***dictum*** only (489 F.2d at 1228). Such reliance is completely misplaced.

In ***Taum Sauk***, this Court was not concerned with the project's effect on navigation. Hence, its distinction between hydroelectric and steam plants rested on the fact that while both hydroelectric and steam plants might produce energy transmitted in interstate commerce, only hydroelectric facilities utilized water resources that were the subject matter of Part I of the Act and the basis of the Commission's licensing jurisdiction. This Court never considered or needed to consider the proposition that steam plants might also utilize so much of a water resource as to affect significantly the development of a waterway with respect to navigation and other beneficial purposes, so as to require a license.

It is shown in this brief that the steam plants which Petitioners contend are subject to Commission jurisdiction will have significant impacts upon jurisdictional waterways and affect potential navigation. Thus, the distinction asserted by the court below based upon ***Taum Sauk*** is not applicable in this case.

In *Taum Sauk*, this Court recognized that Section 23(b) was not limited to only a consideration of downstream navigability (381 U.S. at 98). This case presents a different issue: the steam plants are located on the Colorado River, which is a navigable river within the reach of the interstate commerce clause and the construction and operation of those plants will have a definite effect on that river.

II.

THE PUBLIC INTEREST REQUIRES THAT THE COMMISSION ASSERT ITS LICENSING AUTHORITY OVER STEAM PLANTS THAT AFFECT JURISDICTIONAL WATERS.

Section 4(e) of the Federal Power Act, 16 U.S.C. 799, authorizes the Commission to issue licenses for . . . "project works . . . across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction . . . ***Provided further,*** . . . Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission . . . "[32]

[32] The complete text of Section 4(e) is as follows:

"(e) To issue licenses to citizens of the United States, or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: ***Provided,*** That licenses shall by issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was

The effect of bringing projects within the licensing authority of the Commission has measurably improved the capability of the Commission to cope with the wide range of problems it has had to deal with not only under its comprehensive Part I authority but also with the problems sometimes associated with its Part II jurisdiction over interstate sales and transmission of electricity.

For example, the Commission's licensing proceedings have given the Commission the opportunity to consider items as diverse as

> "water resource development, navigation and safety considerations, provisions prescribing water releases 'for beneficial public uses, including recreational purposes', the construction and maintenance of fish and wildlife facilities, the free use of project

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created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. ***Provided further,*** That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: ***Provided further,*** That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: ***And provided further,*** That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the provisio of said subsection. [41 Stat. 1065-1066; 49 Stat. 840-841; 61 Stat. 501; 16 U.S.C. 787 (e)]."

> lands and waterways for the maintenance and operation of federal fish and wildlife facilities, the free use of project lands and waterways for the maintenance and operation of recreational facilities and modification of project structures and operations as may be requested by federal and state agencies for recreation, free public access to project waters and land, measures to prevent soil erosion, including revegetation of exposed soil surfaces, disposal of unused timber, brush, refuse and other materials resulting from project operations, and the restoration of streams in case the project is abandoned."[33] (Footnotes omitted).

More important, from the point of view of the smaller electric systems of the country (like the Cities here), the licensing process enables the Commission to scrutinize the effect of the project upon antitrust issues, as is required by Section 10(h) of the Federal Power Act.[34] As here relevant, that Section provides:

> "That combinations, agreements, arrangements, or understandings, expressed or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

For example, in the ***Northfield Mountain Case, Western Massachusetts Electric Company***, 39 F.P.C. 723, ***affirmed, Municipal Electric Association of Massachusetts v. Federal Power Commission***, 414 F.2d 1206 (D.C. Cir. 1969), the Commission ordered, and the Court of Appeals affirmed, a condition requiring the licensees to make additional capacity from the project available to small electric systems on a nondiscriminatory basis and to provide transmission for such power, 414 F.2d at 1209.

As this Court and lower courts have made abundantly clear, licensing authority such as the FPC possesses under

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[33] Tarlock, Tippy & Francis, "Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions," 45 S. Cal. L. Rev. 502, 518 (1972).

[34] 16 U.S.C. 803(h).

Part I of the Act must be utilized to accomodate the national interest expressed in varying statutory schemes, and "...such an accomodation does not authorize the agency in question to ignore the antitrust laws." ***FMC v. Svenska Amerika Linien,*** 390 U.S. 238, 245, n.4 (1968). See also, ***e.g., McLean Trucking Company v. United States,*** 321 U.S. 67 79-80 (1944); ***Northern Natural Gas Co.*** v. ***Federal Power Commission,*** 399 F.2d 953, 959 (D.C. Cir. 1968).

Too often, a placement of a large steam plant on or affecting navigable streams, will effectively preempt any other electric system (including the smaller ones) in the region from being able to utilize the same stream for their own plants. Part I of the Act was directed against the private monopolization of public resources. The public interest plainly calls, in these days of critical fuel shortage and rampaging inflation, for consideration of the sort the Federal Power Commission is empowered to give under Part I of the Act. Thus, the Commission could provide for a nondiscriminatory utilization of the water here involved (plainly a public resource within the contemplation of the framers of the 1920 Act) in a way that would also provide to all segments of the industry the advantages of the economies of scale, and commensurate total fuel savings of substantial proportions.

The Commission's conditioning authority under Part I, like that under the Natural Gas Act, is plenary. See, ***e.g., United Gas Improvement Co. v. Callery Properties,*** 382 U.S. 223 (1965); ***Federal Power Commission v. Sunray DX Oil Co.,*** 391 U.S. 9, (1968); ***Atlantic Refining Co. v. PSC of New York,*** 360 U.S. 378 (1959). See also, ***Russell v. Farley,*** 15 Otto 433, 26 L.Ed. 1060, 1063 (1882); ***Federal Power Commission v. Hunt,*** 376 U.S. 515 (1964); ***Texaco v. Federal Power Commission,*** 290 F.2d 149 (5th Cir. 1961). Indeed, this Court has affirmed the Commission in its use of its plenary conditioning powers for the benefit of the national interest under Part I. ***E.g., Federal Power Commission v. Idaho Power Co.,*** 344 U.S. 17 (1952). Thus, as this Court noted in ***Gulf States Utilities Company v. Federal Power Commission,*** 411 U.S. 747 at 760 (1973), the Commission in its conditioning powers should serve "the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings".

This licensing "first line" function authority of the Commission has had considerable practical benefit to the individual regions and to the country. For example, out of the ***Northfield Mountain*** case, ***supra***, and the Commission's regulatory responsibilities under Part I, has grown the New England Power Pool ("NEPOOL"), which provides an opportunity to achieve the benefits of economies of scale and coordinated operation and planning to all members, public and private, big and small. Similarly, out of this Court's decision in ***Gulf States***, ***supra***, grew an agreement between Gulf States and the Cities of Lafayette and Plaquemine that provided for substantial benefits to the customers of both Gulf States and the Cities and a cessation of the anticompetitive conduct which had been alleged on the part of Gulf States, transmission availability for the Cities and much stronger interconnections and possibilities of coordination for the benefit of all.

In sum, what has happened has been that the refusal of the FPC to regulate plants like those at issue in this proceeding, which utilize huge portions of the nation's water resources, and by so doing preempt other uses, has created a lacunae of regulation, the sort of "attractive gap" that this Court in ***Federal Power Commission v. Transcontinental Gas Pipeline Corp.***, 365 U.S. 1, 20-22 (1961); and ***California v. Lo-Vaca Gathering Co.***, 379 U.S. 366, 369-370 (1965) has determined Congress could not likely have intended to leave. For these reasons, it is even more essential that this Court direct the FPC to assert its appropriate licensing authority under Part I of the Act over steam plants that affect navigable waters.

III.

THE DECISION OF THE COURT BELOW RELATING TO THE COMMISSION'S AUTHORITY UNDER THE SURPLUS WATER CLAUSE SHOULD BE UPHELD.

We have shown that the court below erred in its failure to require the FPC to exercise its jurisdiction under Part I of the Act with respect to steam plants utilizing the public resource of water affecting the navigable waters of the

United States. The Commission and Arizona Public Service Co. *et. al.*, however, have asserted, in their briefs to this Court, that the court below erred in the limited relief it did grant. While this Court need not reach the issue, we now turn to the issue of limited relief, as to which the court below was correct.

The court below held that Section 4(e) of the Act "empowers the FPC to license the use of surplus water by steam plants."[35] The court arrived at the proper scope of FPC jurisdiction by analyzing the legal and historical context. It concluded that the basic principle underlying the Federal Water Power Act was as follows:

> The water resources, including the inherent water power, controlled by the Government were increasingly seen as a valuable asset to be exploited in a way that would benefit the public by insuring the self-sufficiency of projects and maximum use of public resources."[36]

The court concluded that the "surplus water" provision of Section 4(e) should be read separately from the project authorization provisions, which related to the more limited task of regulating nonfederal hydroelectric projects. Subsequent Acts relating to the Boulder Canyon Project, TVA and flood control projects reaffirmed the breadth of traditional concern. In the absence of an adequate record, the court did not rule on the application of the surplus water provision to the plants in this case, but held that the FPC had jurisdiction to license them if they fell within the surplus water category claimed by Petitioners.

Both the Commission and the Companies in their briefs contend that the court below erred in its finding that the surplus water clause granted the Commission jurisdiction to license thermal electric generating plants.[37]

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[35] *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, 489 F.2d 1207 (1973), at 1235.

[36] *Id.*, at 1240.

[37] Brief for the Federal Power Commission, pp. 41-53; Brief for Arizona Public Service Company, *et. al.*, pp. 44-74.

The Commission argues that the legislative history of the Federal Power Act relates to the Act as a whole, and that the history of the Act, as interpreted by the court in making its determination that "project works" refers only to hydroelectric facilities, is similarly applicable to the surplus water clause. The Commission attempts to contradict the findings of the court that "no useful legislative history" exists which aids in the interpretation of Section 4(e) by presenting a review of the legislative history which is "fully consistent with the Act's limited purpose of developing ***hydro-electric*** power but not regulating steam power."[38]

The Companies' brief similarly takes the position that the court's findings with respect to its resolution of the "project waters" issue were dispositive of the surplus water question. The Companies, in their brief and supplement, submit an extensive and detailed narrative of the legislative history of the Act purportedly relating to the surplus water clause. Their conclusion is that "the Congressional debates, discussions, committee reports, and proposed bills mention 'surplus water' ***only*** in context of hydro-electric generation."[39]

The Cities fully support the decisionof the court below with respect to the surplus water issue that "Section 4(e) assures maximum utilization of water resources for navigation, water power, and other beneficial uses by providing for the licensing, in accordance with §10(a) . . . of non-federal construction and operation of water power projects on navigable waters, public lands or reservations, and for the licensing of the non-federal use either of water impounded by a Government dam and not required for governmental purposes."[40]

The only new issue raised by the Respondents is whether their review of the legislative history presents a persuasive reason for this Court to reject the decision by the court below. Cities find the material relating to legislative history in both the Commission and the Companies'

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[38] Brief for the Federal Power Commission, p. 42.

[39] Brief for Arizona Public Service Company *et.al.*, p.55.

[40] 489 F.2d at 1240.

briefs and supplement copious but not determinative of the issue. Excerpts of the statements of various individual congressmen in the course of the passage of Part I of the Act indicate a wide variety of opinions as to the appropriate scope of the Act, but they do not explain why the statute contains the phrase, "surplus water or water power," instead of "surplus water" or water power" alone. When the agency must give a tortured reasoning in order to arrive at the conclusion sought by the party and that conclusion necessarily is against the public policy as stated herein, it becomes incumbent upon the court to give the words their ordinary meaning as did the court below on this issue.[41] This is a sound rule of statutory construction; it also is in accord with the public interest as represented in the Act's broad objectives.

CONCLUSION

For the foregoing reasons, this Court should reverse the holding of the court below that the Federal Power Commission does not have jurisdiction, under Part I of the Act, over steam plants which require the use of water from, and construction of structures into, streams which are, or which significantly affect, navigable waters of the United

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[41] See, *e.g.*, *NLRB* v. *Plasterers' Union*, 404 U.S. 116, (1971), where this court noted:

> "In construing a statute, the Court has ruled that legislative materials, if 'without probative value, or contradictory, or ambiguous,' should not be permitted to control the customary meaning of words." United States v. Dickerson, 310 U.S. 554, 562 (1940). See also Gemsco, Inc. v. Walling, 324 U.S. 244, 260 (1945).

States. Similarly, this Court should affirm the conclusion of the court below that the use of surplus water from Government dams makes the plants at issue in this case jurisdictional under Part I of the Act.

Respectfully submitted,

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